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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

TRINIDAD MARIN,

Defendant and Appellant.

2d Crim. No. B201268
(Super. Ct. No. NA034319-01)
(Los Angeles County)

Trinidad Marin appeals his conviction by jury of multiple acts of sexual misconduct with two minors, his sister-in-law, R.R., and his daughter, J.M. Specifically, he was convicted of three counts of lewd acts upon R.R. (Pen. Code, § 288, subd. (a)),¹ rape of J.M. (§ 269, subd. (a)(1)), continuous sexual abuse of J.M. (§ 288.5, subd. (a)), and three counts of oral copulation of J.M. (§ 288a, subd. (c)(1)). He was sentenced to 31 years to life in state prison.

Appellant contends that his right to a speedy trial was violated by pre-arrest delay, that the trial court committed several prejudicial evidentiary errors, that his trial counsel rendered ineffective assistance of counsel, that there was insufficient evidence to establish the criteria necessary to extend the statute of limitations for some of the charges, that the instruction on the extension criteria was erroneous, and that his conviction for

¹ All statutory references are to the Penal Code unless otherwise stated.

continuous sexual abuse of J.M. should have been dismissed. We agree with his last contention and vacate the conviction for count 6, continuous sexual abuse. (§ 288, subd. (a).) We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Appellant sexually molested his young sister-in-law, R.R., between 1988 and 1993 and his daughter, J.M., between 1993 and 1997. In September of 1997, R.R. reported appellant's conduct to a police officer.

Appellant was aware of the allegations against him in 1997 and conferred with counsel at that time. Counsel told him he would probably be arrested. Appellant "decided to see if a case would be filed." A complaint was filed in October of 1997 but appellant was not arrested until April of 2006. He was tried in April of 2007, and the trial court denied his motion to dismiss for pre-arrest delay.

At a pretrial hearing, a Long Beach police officer testified that in 1997 he was unable to locate appellant. Officers conducted a computer background check, checked department of motor vehicles and utility records, and conducted surveillance at properties where they believed he might be located. One of these locations was a condominium in Carson City, which belonged to appellant's brother-in-law. The brother-in-law told officers that appellant did not live there. Officers eventually gave up their search, but occasionally resumed surveillance efforts. They did not ask appellant's ex-wife, J.R., appellant's whereabouts. In April of 2006 appellant was arrested by Riverside police officers. The circumstances of the arrest are not contained in this record, but at trial J.R. testified that in April of 2006 she hired a private investigator to locate appellant. J.R. is a recording artist and, before appellant's arrest, she discussed appellant's molestation of her sister and daughter in media interviews.

Between the filing of the complaint and appellant's arrest, his case was assigned to a series of investigating officers. In 2002, one of these investigating officers, Susan Nelson, died. The substance of her 1997 interviews and her report were read to the jury pursuant to stipulation.

In support of his motion to dismiss, appellant offered an affidavit in which he stated that, although he was aware of the allegations in 1997, he was unaware that a complaint had been filed. Counsel advised him that he would probably be arrested. In 1997 he lived in Long Beach and then moved in with his sister and brother-in-law in Carson. His ex-wife knew where he was. Due to the passage of time he could not determine where he was at the time of the alleged molestations, he was unable to obtain timecards from his prior employer, he had discarded or misplaced cards from his daughter that would demonstrate that she loved him, and his family members could not "say with any specificity what they saw on what occasions." Appellant chose not to testify at the hearing on his motion to dismiss, relying instead on the passage of time to establish prejudice. His counsel acknowledged that this would require his affidavit to be stricken.

DISCUSSION

Pre-arrest Delay – Right to Speedy Trial and Due Process

Substantial evidence supports the trial court's determination that appellant did not demonstrate prejudice resulting from pre-arrest delay. Unlike the federal Constitution, California's Constitution extends the right to speedy trial to pre-arrest delay. (Cal. Const., art. 1, § 15; *People v. Martinez* (2000) 22 Cal.4th 750, 765.) A defendant claiming a state constitutional speedy trial violation, based on delay between filing of the complaint and arrest, must affirmatively demonstrate that his right to a fair trial was prejudiced by the delay.² (*People v. Martinez, supra*, at p. 768.) Prejudice must be specifically demonstrated and is not presumed from an uncommonly long period of delay. (*People v. Lowe* (2007) 40 Cal.4th 937, 942.) If the defendant demonstrates prejudice, the burden shifts to the prosecution to justify the delay, and the trial court will then weigh the prejudice against the justification to determine whether defendant's ability to defend has been impaired and his right to a speedy trial violated. (*Ibid.*)

² Appellant does not contend that there was any statutory delay that would give rise to a presumption of prejudice here.

Here, we agree with the trial court that no justification was required because appellant did not meet his initial burden of demonstrating any prejudice resulting from the pre-arrest delay. The delay alone did not raise a presumption of prejudice, and even if appellant's affidavit were considered it did not set forth specific facts sufficient to establish any prejudice. (*People v. Lowe, supra*, 40 Cal.4th at p. 939.)

Death of a material witness may constitute prejudice (*People v. Hartman* (1985) 170 Cal.App.3d 572, 579), but no prejudice resulted to appellant from the death of Officer Nelson. Nelson was not an eyewitness to the molestations, and was not the initial investigating officer. She conducted two telephonic follow up interviews in 1997 which were described in her report. The substance of her report was received by stipulation. According to Nelson, J.M. said that appellant "tried to have sexual intercourse with her but it never happened." The stipulation afforded appellant an opportunity to use this statement to impeach J.M.'s testimony that appellant had sexual intercourse with her. Appellant's ability to use this statement for impeachment was not impaired.

Appellant's general claims that witnesses have become unavailable or were unable to recall did not constitute sufficient evidence of prejudice, absent a showing of "the identity of the 'unavailable' witnesses, the nature of what their testimony would have been, when they became unavailable, or what efforts were made by the defendants to locate them or adduce equivalent testimony or evidence . . . [and] facts indicating that these witnesses or this evidence would have been available" in the absence of delay. (*People v. Sahagun* (1979) 89 Cal.App.3d 1, 24.) Appellant's general assertion that family members could not "say with any specificity what they saw on what occasions" was insufficient to meet his burden to demonstrate prejudice.

Appellant points out that only minimal prejudice is required to shift the burden to the prosecution to justify the delay (*People v. Hartman, supra*, 170 Cal.App.3d at pp. 582-583) and argues that his own inability to recall his whereabouts demonstrated minimal prejudice. In *People v. Vanderburg* (1973) 32 Cal.App.3d 526, 533, a defendant did not know of the allegations against him until he was arraigned 11 months after the crime. His own inability to recall his whereabouts and an undercover agents' alleged

inability to recall details of the underlying drug transaction were sufficient to meet his initial burden to demonstrate prejudice arising from the delay. Nevertheless, in view of some justification for the delay and strong evidence of his guilt, his ability to defend was not impaired and an order dismissing his indictment was reversed. Unlike the defendant in *Vanderburg*, appellant did not meet his initial burden of showing even minimal prejudice because he knew of the allegations against him as soon as they were made. Any inability to recall his whereabouts did not result from the delay. He had the ability in 1997 to gather information, seek out witnesses and consider his whereabouts. According to his affidavit, he made a conscious decision, with advice of counsel, to do nothing and to wait to see what would happen. Substantial evidence supports the trial court's implied finding that any inability to recall his whereabouts was not attributable to pre-arrest delay.

Evidentiary Rulings

Only relevant evidence is admissible. (Evid. Code, § 350.) We review a trial court's ruling on admissibility of evidence for abuse of discretion. (*People v. Harris* (2005) 37 Cal.4th 310, 337.) The trial court has broad discretion to exclude evidence pursuant to Evidence Code section 352. (*People v. Castro* (1985) 38 Cal.3d 301, 306-307.)

The court did not abuse its discretion in precluding cross-examination of J.R. as to whether she used R.R. and J.M.'s molestation allegations to further her own career as a recording artist. In opening statement and in closing argument, appellant's counsel suggested that J.R.'s allegations were motivated by a desire for publicity. Appellant's counsel cross-examined J.R. about the media interviews she gave. The court sustained a relevance objection to further questions about the interviews and financial gain, subject to a foundational showing that the molestation allegations actually enhanced her career. Appellant's counsel made no offer of proof other than to say that her career had improved after 1997. In the absence of any causal connection between the improved career and the allegations, the trial court properly concluded that the questions were speculative and that the career evidence was irrelevant. For the same reason, the trial

court acted within its discretion when it precluded appellant's counsel from asking R.R. whether she stood to gain financially by fabricating the allegations in furtherance of J.R.'s singing career.

The trial court did not abuse its discretion when it precluded counsel from asking J.R. whether she reported that another daughter was molested. Appellant contends that proof of false accusations of another molestation were relevant to prove bias. The trial court did not abuse its discretion when it determined that the fact that other people were not molested by appellant did not have a tendency in reason to prove or disprove the charged crimes. Counsel represented that J.R. falsely accused appellant of molesting another daughter, but the trial court would have been within its discretion to determine that the relevance of any such evidence would have been outweighed by confusion and undue consumption of time posed by a mini-trial on another allegation.

The trial court acted within its discretion when it precluded appellant's counsel from asking character witnesses whether appellant, their uncle, was a molester. Appellant was allowed to elicit testimony regarding his good character, and specifically whether he was a good father. The jury was instructed that evidence of good character could raise a reasonable doubt as to guilt. His defense was not impaired by preclusion of evidence of bad acts he had not committed.

Argument on Lack of Other Victims

We reject appellant's contention that the court undermined the prosecution's burden of proof when it did not allow him to argue that the fact that appellant did not abuse other children to whom he had access, tended to disprove guilt of the charged offenses. The absence of other instances of molestation was irrelevant. Whether appellant had a propensity to molest based on prior instances was not an issue in dispute, because the prosecution did not rely on any propensity evidence pursuant to Evidence Code section 1108. Appellant was not precluded from arguing the absence of evidence of proof beyond a reasonable doubt and the jury was properly instructed on the prosecution's burden.

*Flight Instruction, Evidence of Fugitive Status
and Ineffective Assistance of Counsel*

We reject appellant's contention that the court erred when it did not give a flight instruction pursuant to section 1127c, and that his counsel rendered ineffective assistance of counsel when he did not object to J.R.'s statement that appellant was a fugitive.

The trial court did not have a sua sponte duty to give a flight instruction and none was requested. "[W]here evidence of flight of a defendant is relied upon as tending to show guilt," the court has a sua sponte duty to instruct the jury that flight may be considered on the question of guilt or innocence but is not alone sufficient to prove guilt. (§ 1127c.) The prosecution did not rely upon evidence of flight as tending to show guilt in opening statement, closing argument, or by eliciting evidence of flight. The delay between the offenses and trial was not explained to the jury.

The only mention of appellant's flight at trial was an unsolicited statement by J.R. in response to the prosecutor's question asking why she gave media interviews about the case. She responded that the interviews began when, "they asked me what had happened with my first husband. And I mentioned to them that he was a fugitive, that he was running from the law because he had sexually abused my daughter and my sister." Appellant's counsel did not object. J.R. went on to say that the purpose of the interviews was to help others.

To succeed on a claim of ineffective assistance of counsel based on failure to object, the defendant must demonstrate that the failure to object fell below an objective standard of reasonableness under prevailing professional norms, and a reasonable probability that the result would have been more favorable in the absence of the failure. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Appellant has demonstrated neither. The record here does not affirmatively demonstrate that appellant's counsel had no rational tactical purpose for the omission. Counsel could have rationally concluded that he should not call attention to the brief reference to appellant's flight by objecting or requesting a flight instruction. Further, there is no reasonable probability that the result

would have been more favorable if counsel had objected. There was substantial evidence of appellant's guilt and objection to the fugitive reference could have led to further evidence of his flight which could have been considered on the question of his guilt.

Appellant has also not established that his counsel rendered ineffective assistance when he did not object to the hearsay testimony of R.R. that, when R.R. was 13, J.M. said to her, "I know why you hate my dad . . . because he does to me what he did to you." "[T]he decision whether to object is inherently tactical, the failure to object to evidence will seldom establish incompetence (*People v. Freeman* (1994) 8 Cal.4th 450, 490-491), and this instance is no exception. Defense counsel could have rationally concluded that it was tactically preferable not to call attention to the statement, or he may have rationally concluded that its admission was admissible as a prior consistent statement to rebut charges of fabrication. (Evid. Code, § 791.)

Statute of Limitations, Counts 1 and 3 (§ 288, subd. (a))

The statute of limitations on counts 1 and 3 (§ 288, subd. (a), lewd acts upon R.R.) was extended by the provisions of section 803, subdivision (f)(1) (formerly subd. (g)), based on special jury findings. Extension under that statute requires proof of substantial sexual conduct and independent corroboration by clear and convincing evidence. (*Ibid.*) We reject appellant's contentions that no substantial evidence demonstrated substantial sexual contact or independent corroboration, that the extension criteria should have been proven beyond a reasonable doubt, and that the extension instruction invited jury nullification and self-corroboration.

"Substantial sexual conduct" means penetration, oral copulation or masturbation of the victim or offender. (§ 1203.066, subd. (b).) "Section 1203.066 does not impose any specific requirements as to the form, manner, or nature of any act of masturbation." (*People v. Terry* (2005) 127 Cal.App.4th 750, 772.) Masturbation is any contact or touching of the genitals with the requisite intent, "however slight" (*People v. Chambliss* (1999) 74 Cal.App.4th 773, 786-787), and does not require skin to skin contact. (*People v. Terry, supra*, at p. 772.) R.R. testified to substantial sexual conduct in support of count 1 when she testified that appellant touched her vagina and put his

fingers over her clitoris. She testified to substantial sexual conduct in support of count 3 when she testified that he moved his hand under her skirt near her vagina while she was seated on his lap. J.M.'s testimony provided clear and convincing independent corroboration of R.R.'s allegations. Evidence of a defendant's molestation of another victim alone may constitute independent corroborating evidence for purposes of section 803. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 659.) We reject appellant's contention that corroboration by another victim of a charged offense should be precluded.

The trial court properly instructed that the burden of proof on the extension criteria of substantial sexual conduct and independent corroboration are preponderance of the evidence and clear and convincing evidence, respectively. (*People v. Riskin* (2006) 143 Cal.App.4th 234, 238.) As appellant concedes, California courts have uniformly rejected his contention that the extension criteria must be proven beyond a reasonable doubt pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466. (*People v. Riskin, supra*, at p. 238; *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1285-1286; *People v. Linder* (2006) 139 Cal.App.4th 75, 85.)

Appellant waived his objection that the instruction on the extension criteria invited jury nullification and allowed self-corroboration, because he did not object or request modification of the instruction in the trial court. (§ 288a, subd. (c)(1).)

Dismissal of Count 6

Appellant contends, and respondent agrees, that count 6, continual sexual abuse (§ 288.5, subd. (a)), should have been dismissed because appellant was convicted of the alternative lesser specific offenses charged in counts 7, 8 and 9.

Cumulative Error

We reject appellant's claim of cumulative error. The evidence of appellant's guilt was strong, and no error occurred that is reasonably probable to have resulted in a different verdict.

Appellant's conviction on count 6 is vacated. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Joan Comparet-Cassani, Judge
Superior Court County of Los Angeles

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